

FILED BY CLERK

AUG 22 2007

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

TIMOTHY PHILLIP PENA,

Appellant.

)
)
) 2 CA-CR 2006-0269
) DEPARTMENT A
)

MEMORANDUM DECISION

) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20022179

Honorable Howard Hantman, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Jack L. Lansdale, Jr.

Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Timothy Pena was convicted of one count each of aggravated driving under the influence of an intoxicant (DUI) while his license was

suspended or revoked and aggravated driving with an alcohol concentration of .08 or more while his license was suspended or revoked. The trial court sentenced him to presumptive, enhanced prison terms of 4.5 years, to be served concurrently with each other and with two concurrent prison terms imposed in another cause. On appeal, Pena argues that extradition costs were erroneously imposed after oral pronouncement of sentence, and that the trial court abused its discretion in denying his motion for judgment of acquittal. Finding no reversible error, we affirm.

¶2 We view the facts in the light most favorable to sustaining the convictions. *See State v. Johnson*, 210 Ariz. 438, ¶ 2, 111 P.3d 1038, 1039 (App. 2005). In April 2002, two security guards saw Pena get into the driver's seat of his sport-utility vehicle (SUV), which was parked in a restaurant parking lot, and turn on the engine. Soon after that, a Tucson Police Department patrol car pulled up behind Pena's SUV. A police officer testified that the SUV's headlights were on and Pena was "standing just outside the driver's side door." Pena reached into the SUV through the driver's side window, turned off the engine and lights, and removed the ignition key.

¶3 After stating he was too drunk to drive and refusing to perform field sobriety tests, Pena was arrested for DUI. He did not appear at a pretrial status conference, and a bench warrant issued for his arrest. He was tried and convicted in absentia in December 2002. In 2006, Pena was arrested in New York and transported to Tucson. Before sentencing, the trial court held a prior convictions trial, finding Pena had one historical prior

conviction. After sentencing, the trial court signed an order granting the state's motion to impose extradition costs.

¶4 Pena first argues he is entitled to resentencing on the issue of extradition costs. He claims that the trial court should have imposed those costs in open court at the sentencing hearing, not by order following that hearing, and that he had a right to be present. Because Pena did not raise this issue below, we review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). “To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.” *Id.* ¶ 20.

¶5 Citing *State v. Cox*, 201 Ariz. 464, 37 P.3d 437 (App. 2002), Pena contends the imposition of extradition costs was an illegal sentence and thus constituted fundamental error. But Pena does not argue that the trial court lacked authority to impose extradition costs or that the amount ordered was erroneous. Accordingly, he has failed to carry his burden to show prejudice, *see Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607, even if an error that could be characterized as fundamental occurred.

¶6 Pena next argues the trial court abused its discretion by denying his motion for judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S., “and finding that there was substantial evidence showing that [Pena] was in actual physical control.” We review the denial of a Rule 20 motion for an abuse of discretion. *State v. Hollenback*, 212 Ariz. 12, ¶ 3, 126 P.3d 159, 161 (App. 2005). We view the evidence in the light most

favorable to sustaining the trial court's decision. *See State v. Sullivan*, 205 Ariz. 285, ¶ 6, 69 P.3d 1006, 1008 (App. 2003).

¶7 A trial court must grant a Rule 20 motion “if there is no substantial evidence to warrant a conviction.” Ariz. R. Crim. P. 20(a); *see also State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). “‘Substantial evidence is more than a mere scintilla and is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.’” *State v. Ellison*, 213 Ariz. 116, ¶ 65, 140 P.3d 899, 917, *cert. denied*, ___ U.S. ___, 127 S. Ct. 506 (2006), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). We will affirm the trial court's ruling if reasonable minds could differ on inferences to be drawn from the evidence. *See Sullivan*, 205 Ariz. 285, ¶ 6, 69 P.3d at 1008.

¶8 Pena contends there was insufficient evidence that he was in “actual physical control” of the automobile. *See* A.R.S. § 28-1383(A). “The phrase ‘actual physical control’ has never been defined in Arizona's DUI statutes, but it has been the focus of an evolving series of court decisions.” *State v. Rivera*, 207 Ariz. 69, ¶ 9, 83 P.3d 69, 72 (App. 2004) (citation omitted). The trier of fact determines whether a person is in actual physical control based on the “totality of the circumstances.” *State v. Love*, 182 Ariz. 324, 326, 897 P.2d 626, 628 (1995).

Factors to be considered in any given case might include: whether the vehicle was running or the ignition was on; where the key was located; where and in what position the driver was found in the vehicle; whether the person was awake or asleep;

if the vehicle's headlights were on; where the vehicle was stopped (in the road or legally parked); whether the driver had voluntarily pulled off the road; time of day and weather conditions; if the heater or air conditioner was on; whether the windows were up or down; and any explanation of the circumstances advanced by the defense.

Id. Ultimately, the trier of fact is “entitled to examine all available evidence and weigh credibility in determining whether defendant was simply using the vehicle as a stationary shelter or actually posed a threat to the public by the exercise of present or imminent control over it while impaired.” *Id.* at 326-27, 897 P.2d at 628-29.

¶9 Here, the state presented evidence that Pena had opened the door to the SUV, had sat down in the driver's seat, and had started the engine. There was also testimony that the SUV's headlights were on. Under *Love*, these are among the “[f]actors to be considered” by the trier of fact in the totality of the circumstances analysis. *Id.* at 326, 897 P.2d at 628.

¶10 Pena emphasizes other factors, claiming the “inescapable conclusion is that there was insubstantial evidence that [Pena] was in actual physical control of his vehicle.” But none of the factors he mentions proves as a matter of law that he was not in actual physical control of the SUV. Therefore, it was for the jury to decide how much weight to accord each factor. *See id.* at 326-27, 897 P.2d at 628-29. Based on the evidence presented, reasonable persons could have concluded Pena “actually posed a threat to the public by the exercise of present or imminent control over [the vehicle] while impaired.” *Id.* Accordingly, the trial court did not abuse its discretion in denying Pena's Rule 20 motion.

¶11 For the foregoing reasons, we affirm Pena’s convictions. We note that the sentencing minute entry erroneously classifies the offenses as “nonrepetitive,” although it properly lists the presumptive, enhanced prison terms of 4.5 years. *See* A.R.S. § 13-604(A). Accordingly, we modify the sentencing minute entry to classify the offenses as “repetitive,” *see State v. Jonas*, 164 Ariz. 242, 245 n.1, 792 P.2d 705, 708 n.1 (1990), and affirm the enhanced sentences as modified.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

PETER J. ECKERSTROM, Judge